

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Introduction of New Advanced Mobile and)	ET Docket Nos. 00-258 and
Fixed Terrestrial Services; Use of Frequencies)	95-18; IB Docket No. 99-81
Below 3 GHz)	
)	
Petition for Rulemaking of the Cellular)	RM-
Telecommunications & Internet Association)	
Concerning Reallocation of 2 GHz Spectrum)	
for Terrestrial Wireless Use)	

To: The Commission

**COMMENTS OF CINGULAR WIRELESS IN SUPPORT OF
CTIA PETITION FOR RECONSIDERATION**

Cingular Wireless LLC (“Cingular”) hereby submits these comments in support of the Petition for Reconsideration filed by the Cellular Telecommunications & Internet Association (“CTIA”) on October 15, 2001.¹ In its petition, CTIA asks the Commission to reconsider the denial of CTIA’s Petition for Rulemaking to reallocate the 2 GHz Mobile Satellite-Service (“MSS”) band for other, more efficient uses.² Cingular supports CTIA’s position that the denial was contrary to FCC rules and principles of reasoned decisionmaking.

As discussed below, in order to correct the unreasoned decisionmaking to date concerning the MSS spectrum, the Commission should grant both the CTIA Petition for Reconsideration and the Application for Review filed by AT&T Wireless, Cingular, and Verizon

¹ Petition for Reconsideration of the Cellular Telecommunications & Internet Association (filed October 15, 2001) (“CTIA Petition for Reconsideration”).

² See Petition for Rulemaking of the Cellular Telecommunications & Internet Association (filed May 18, 2001) (“CTIA Petition for Rulemaking”).

Wireless.³ Pending the final outcome of these related proceedings, the Commission should decline to take action in response to the pending *Flexible Use Notice*.⁴

DISCUSSION

The CTIA Petition for Reconsideration is one of several pleadings pending before the Commission seeking a reexamination of whether the original 2 GHz mobile satellite allocation remains justified in light of changed circumstances and competing terrestrial needs.⁵ When the FCC first allocated 70 MHz of spectrum to MSS in 1997, and when it affirmed this allocation in 2000, it relied heavily upon statements of applicants that MSS would bring service to rural and underserved areas and was therefore in the public interest.⁶ Prior to licensing, however, two MSS applicants, New ICO Global Communications (Holdings) Ltd. (“New ICO”) and Motient Services Inc. (“Motient”), made filings with the FCC that MSS was not commercially viable and could not sustain service to rural areas absent a fundamental license change to allow the

³ See Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC (filed Aug. 16, 2001) (“Application for Review”).

⁴ *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, IB Docket No. 01-185 & ET Docket No. 95-18, *Notice of Proposed Rulemaking*, FCC 01-225 (rel. Aug. 17, 2001) (“*Flexible Use Notice*”).

⁵ See, e.g., CTIA Petition for Reconsideration, *supra* note 1; CTIA Petition for Rulemaking, *supra* note 2; Application for Review, *supra* note 3; Joint Comments of Cingular Wireless and Verizon Wireless in IB Docket No. 01-185 (Oct. 22, 2001) (“Joint Comments”); Joint Reply Comments of Cingular Wireless and Verizon Wireless in IB Docket No. 01-185 (Nov. 13, 2001) (“Joint Reply Comments”).

⁶ *Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, *First Report and Order and Further Notice of Proposed Rule Making*, 12 F.C.C.R. 7388, 7395 (1997), *recon.*, 13 F.C.C.R. 23949 (1998); *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, 16145 (2000).

provisioning of non-satellite terrestrial service in more profitable urban areas.⁷ This new information, along with a string of MSS market failures, including several bankruptcies,⁸ raised substantial questions whether MSS was a viable service capable of achieving its purpose and whether licensing should proceed.

Based on this evidence, CTIA recognized that MSS spectrum would be underutilized while the competing spectrum needs of terrestrial mobile providers continued unabated. Accordingly, CTIA filed a petition for rulemaking urging the FCC to consider whether to reallocate the 2 GHz MSS spectrum to other competing uses consistent with its “highest and best use” spectrum management policy *before* licensing MSS providers whose offerings might not be viable.⁹ CTIA argued that any spectrum reallocated for terrestrial services should be licensed by competitive bidding pursuant to Section 309(j) of the Communications Act.¹⁰ Several terrestrial wireless providers, including Cingular, submitted filings in support of CTIA’s petition.¹¹ The International Bureau (“Bureau”) ignored the evidence before it and proceeded with licensing rather than considering the merits of the CTIA Petition for Rulemaking.

⁷ *Ex Parte* Letter from Lawrence H. Williams and Suzanne Hutchings, New ICO Global Communications (Holdings) Ltd., to Chairman Michael K. Powell, Federal Communications Commission, IB Docket No. 99-81, at 6 (March 8, 2001) (“New ICO *Ex Parte*”); Application filed by Motient Services Inc. and Mobile Satellite Ventures Subsidiary LLC for Assignment of Licenses and for Authority to Launch and Operate a Next-Generation Mobile Satellite Service System, at 12 (filed March 1, 2001) (“Motient Application”).

⁸ See Application for Review at 3-4, 10; CTIA Petition for Rulemaking at 3; CTIA Petition for Reconsideration at 6; Joint Comments at 19 & n.56.

⁹ See CTIA Petition for Rulemaking at 2-5.

¹⁰ See *id.* at 6-7.

¹¹ See *Ex Parte* Letter from AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint PCS, and Verizon Wireless (June 13, 2001).

The Bureau's *Licensing Orders* failed to resolve substantial and material questions of fact whether MSS is viable in light of evidence by applicants and a series of well-known MSS market failures.¹² In failing to do so, the Bureau did not resolve whether the MSS spectrum allocation continued to make sense where (i) the factual predicate for the allocation – service to rural and underserved areas – was undermined by applicants' own statements and (ii) evidence was submitted that terrestrial mobile uses represent the highest and best use of the spectrum.¹³ Instead, the Bureau granted the MSS applications, finding that applicants should be given the opportunity "to succeed or fail in the market on their own merits."¹⁴ Cingular, Verizon Wireless and AT&T Wireless challenged the *License Orders*, demonstrating that grant prior to resolving substantial and material questions of fact was unreasoned and contrary to law.¹⁵

Only days after the filing of that Application for Review, the FCC released its *Advanced Services Notice* denying the CTIA Petition for Rulemaking without seeking public comment as required by its rules and without providing a reasoned basis for the denial.¹⁶ The denial stated

¹² See Application for Review at 12-15.

¹³ See *id.* at 8-12.

¹⁴ See *ICO Services Limited*, DA 01-1635, at ¶ 31 (IB & OET July 17, 2001) ("*ICO Services*"), *app. rev. pending*; see also *Boeing Co.*, DA 01-1631, at ¶ 43 (IB July 17, 2001), *app. rev. pending*; *Celsat America, Inc.*, DA 01-1632, at ¶ 22 (IB July 17, 2001), *app. rev. pending*; *Constellation Communications Holdings, Inc.*, DA 01-1633, at ¶ 24 (IB & OET July 17, 2001), *app. rev. pending*; *Globalstar, L.P.*, DA 01-1634, at ¶ 47 (IB & OET July 17, 2001); *Iridium LLC*, DA 01-1636, at ¶ 33 (IB July 17, 2001), *app. rev. pending*; *Mobile Communications Holdings, Inc.*, DA 01-1637, at ¶ 25 (IB & OET July 17, 2001), *app. rev. pending*; *TMI Communications and Co., Limited Partnership*, DA 01-1638, at ¶ 19 (IB July 17, 2001), *app. rev. pending* (collectively, the "*License Orders*").

¹⁵ See Application for Review at 8-15.

¹⁶ See *Introduction of New Advanced Mobile and Fixed Terrestrial Wireless Services; Use of Frequencies Below 3G*, ET Docket Nos. 00-258 and 95-18 and IB Docket No. 99-81, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 01-224, at ¶ 23 (rel. Aug. 20, 2001) ("*Advanced Services Further Notice*"), *pet. recon. pending*.

only that such action was consistent with the Bureau's *Licensing Orders* and the public interest.¹⁷ Cingular agrees with CTIA that the Commission must seek public comment in accordance with Section 1.401 of its rules,¹⁸ and that the FCC's perfunctory statement that refusal to initiate a rulemaking is in the public interest is insufficient and "crosses the line from 'the tolerably terse to the intolerably mute.'"¹⁹ Moreover, to the extent the denial is arguably based upon the licensing orders, Cingular agrees that reliance is unreasoned.²⁰ As CTIA correctly notes, "[b]y making licensing decisions that parsed out most of the spectrum at issue in CTIA's petition without first considering the merits of CTIA's petition, the Bureau has prejudged the outcome."²¹ Such reliance is also unreasonable because no consideration has been given to whether the factual predicate for the allocation has been undermined.²²

Barely three weeks after determining the market should decide the fate of MSS, the FCC adopted its *Flexible Use Notice* proposing to intervene in the market by fundamentally changing the nature of MSS licenses to allow the provisioning of terrestrial service.²³ In their Joint Comments in that proceeding, Cingular and Verizon Wireless demonstrated that such intervention is contrary to (i) Section 309(j), which requires that spectrum used to provide terrestrial services be auctioned, and (ii) reasoned decisionmaking, because the FCC had

¹⁷ See *id.*

¹⁸ See CTIA Petition for Reconsideration at 3-4.

¹⁹ See *id.* at 4-5 (quoting *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970)).

²⁰ See CTIA Petition for Reconsideration at 6-7.

²¹ *Id.* at 6 & n.16.

²² See *id.* at 7-10.

²³ See generally *Flexible Use Notice*, *supra* note 4.

determined in the *Licensing Orders* to allow market forces to determine the viability of the MSS industry.²⁴ The Joint Reply Comments also showed that the earlier admissions of nonviability in the absence of terrestrial authority by Motient and New ICO were now echoed by a growing chorus of other MSS licensees.²⁵ Indeed, since reply comments were filed in this proceeding just last week, Globalstar has announced that it will follow in the footsteps of both Iridium and ICO and declare Chapter 11 bankruptcy.²⁶ Collectively, this evidence only reemphasizes that had the FCC taken the original CTIA filing seriously before taking any licensing action or beginning

²⁴ See Joint Comments at 7-23; see also Joint Reply Comments at 3-11.

²⁵ See Joint Reply Comments at 17-21; see also Joint Comments at 16-23. For example, Motient, now joined by TMI, reiterated that terrestrial service “is critical to making MSS a vital and viable nationwide mobile service,” contending that an MSS business that can succeed without terrestrial operations “is the exception rather than the rule.” Comments of Motient Services, Inc., TMI Communications and Company, Limited Partnership, and Mobile Satellite Ventures Subsidiary LLC in IB Docket No. 01-185 at i, 12. Likewise, New ICO reemphasized that terrestrial authority “is critical for MSS” and that it should not be relegated “to serving only the less profitable rural areas.” Comments of New ICO Global Communications in IB Docket No. 01-185 at 2, 4, 6. Globalstar’s Bondholders stated that terrestrial authority is necessary to put Globalstar on “sound financial footing,” acknowledging that, as licensed, “it is unlikely that Globalstar will be able to raise sufficient capital to launch its second generation satellite constellation.” Comments of Unofficial Bondholders Committee of Globalstar, L.P. in IB Docket No. 01-185 at v, 17. MCHI similarly admitted that without terrestrial authority “it has been difficult for the MSS industry to attract capital.” Comments of Mobile Communications Holdings, Inc. in IB Docket No. 01-185 at 10-11. Loral (the largest equity owner in Globalstar) acknowledged that as licensed “some of the licensed MSS networks may not come to fruition, while other MSS operators may not attain the subscriber levels that will allow them . . . to offer . . . service and support to underserved areas.” Comments of Loral Space and Communications Ltd. in IB Docket No. 01-185 at 2, 4-5. Even Celsat admitted that without terrestrial authority, “spectrum will lie fallow.” Comments of Celsat America, Inc. in IB Docket No. 01-185 at 9. Notably, Iridium, itself an MSS operator, emphasized that “[I]f ICO’s [terrestrial use] proposal (or some close variation on that theme) is adopted, the Communication will all but ensure that few, if any, of the recently authorized 2 GHz MSS systems will ever be built.” Comments of Iridium Satellite LLC in IB Docket No. 01-185 at 2-3.

²⁶ See, e.g., Kristy Bassuener, *Globalstar to File Chapter 11*, Wireless Week (Nov. 14, 2001); *Globalstar Announces Plans to Enter Chapter 11 Bankruptcy*, Communications Daily (Nov. 15, 2001); see also *Takeoffs Rocky for Satellite Telecom Firms*, Reuters (Nov. 13, 2001) (“The satellite industry has been marked by false starts and bankruptcies, including news from Globalstar . . . that it was close to signing a pre-packaged bankruptcy plan.”)

down the road of exploring flexible use, fundamental decisions about the use of MSS spectrum could have been made rationally. The Commission must revisit the issue of MSS viability before proceeding further.

CONCLUSION

For the reasons stated above and detailed more fully in the CTIA Petition for Reconsideration (hereby incorporated by reference), Cingular believes that reconsideration is warranted. The course of proceedings to date has been unreasoned, and grant of the CTIA Petition for Reconsideration (and the underlying Petition for Rulemaking) by seeking full public comment on the viability of MSS and the highest and best use of the 2 GHz MSS spectrum is the first step to correct this error. Merely granting the Petition for Reconsideration putting the Petition for Rulemaking out for comment, however, will not alone cure the problem, given the prejudicial licensing actions taken immediately prior to denying the Petition for Rulemaking. Accordingly, the Commission should also grant the Application for Review and take the action requested therein, while holding the *Flexible Use* proceeding in abeyance, to allow the Commission to fully consider the issues raised by CTIA in a reasoned manner.

Respectfully submitted,

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November 19, 2001

CERTIFICATE OF SERVICE

I, Ernestine M. Screven, hereby certify that a copy of the foregoing has been served this 19th day of November, 2001, by first class United States mail, postage prepaid, on the following:

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Ernestine M. Screven